DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

CACR 05-1225

JUNE 28, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION
[NO. CR04-115, CR04-4602]

HONORABLE JOHN W. LANGSTON, JUDGE

AFFIRMED

EARLENE PATRICE MOORE
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Appellant Earlene Patrice Moore filed notices of appeal from the revocation of her probation for theft by receiving, CR2004-115, and from the conviction entered after a bench trial on the charge of aggravated robbery, CR2004-4602. Both cases were heard in Pulaski County Circuit Court on the same date. Her attorney filed a no-merit brief and a motion to be permitted to withdraw as counsel on the revocation case. Her attorney filed a merit-based brief arguing that there is insufficient evidence upon which to sustain the conviction on aggravated robbery. After proper appellate analysis of each aspect of this appeal, we affirm the revocation and relieve counsel, and we affirm the conviction because it is supported by sufficient evidence.

We first consider the merit-based appeal regarding the conviction for aggravated robbery. Arkansas Code Annotated section 5-12-102(a) states that "[a] person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another." Arkansas Code Annotated section 5-12-103(a)(1) states that

"[a] person commits aggravated robbery when he is armed with a deadly weapon, or he represents by word or conduct that he is so armed." Appellant contends on appeal that this conviction is not supported by sufficient evidence because there was no real weapon ever directed at the victim, appellant did not take anything from the victim, and the victim's testimony was generally not believable. We disagree.

At trial on aggravated robbery, the victim, seventeen-year-old John David Shy, testified that on June 23, 2004, at or around 5:00 p.m., he had entered an E-Z Mart on Kavanaugh Boulevard in Little Rock to buy a soda. As he exited the store to re-enter his Jeep, he observed a female driving a Toyota Camry as she backed the car toward him. The driver positioned the Camry in such a way as to block his Jeep in the parking space, and then she began to question him. He positively identified appellant as this woman. She exited the Camry, sat upon the car's hood, and held a handgun in her lap. She asked him how much money he had, where he lived, and which key was his house key, "trying to get me to give her stuff." He said she "kept threatening me, telling me if I didn't give her what I had, that she was going to kill me," and he thought that her quizzing lasted ten to fifteen minutes. He said the male passenger in the Camry never exited the car, but he threatened to kill Shy if he did not give them $20. He said he was finally able to pull away when she became distracted. Shy memorized the Camry's license plate number and gave it to the police. Shy was able to identify appellant from a lineup. He testified that he was "terrified...very threatened...[and] scared." A police officer testified that when they found the car, there was a toy gun inside, located between the driver's seat and the center console.

Appellant's attorney moved to dismiss this charge on the basis that the gun, which was a toy, was never pointed at the victim, and nothing was ever taken from the victim. Her

attorney argued that this scenario fit more with terroristic threatening than aggravated robbery. The trial judge denied this motion.

Appellant testified in her own defense that she was at the E-Z Mart at the time in question, and she did interact with Shy, but she said she only asked him for a quarter because she and her friend were out of money. Appellant denied having a gun or threatening Shy in any way. Appellant admittedly was a crack cocaine user and was a convicted felon at the time. Her attorney renewed the motion to dismiss, which was denied. Thereupon, the trial judge found appellant guilty. This appeal followed her conviction for aggravated robbery.

A motion for directed verdict or to dismiss is a challenge to the sufficiency of the evidence. *See*, *e.g.*, *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion. *Id*. *See also Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000). In a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the State. *Id*.

It is well settled, and consistent with the statute defining aggravated robbery, that no transfer of property needs to take place to complete the offense. *See Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990). Rather, the focus of aggravated robbery is the threat of harm to the victim; and, consequently, the offense is complete when physical force is threatened. *Id*. The victim in this case testified that appellant encountered him on the store parking lot and demanded that he give her what he had, all the while exposing what appeared to be a handgun to the victim and threatening to kill him. The focus is on what the victim perceived concerning a deadly weapon. *Clemmons v. State*, 303 Ark. 354, 796 S.W.2d 583 (1990). To the extent that appellant complains that the victim's testimony was

not credible, we reject that claim on appeal. The weighing of evidence lies within the province of the fact finder, including determinations regarding the credibility of witnesses. *See*, *e.g.*, *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). The fact finder is free to believe all or part of a witness's testimony, and inconsistent testimony does not render proof insufficient as a matter of law. *Id*. The foregoing constitutes substantial evidence of aggravated robbery, regardless of whether property belonging to Mr. Shy was taken or whether the gun was real. We affirm the conviction for aggravated robbery.

The second portion of this appeal concerns the revocation of appellant's probation, regarding which counsel filed a no-merit brief and a motion to be relieved as counsel. The brief and motion urge us to hold that an appeal of the revocation would be wholly frivolous. The procedure for the filing of a no-merit brief is governed by *Anders v. California*, 386 U.S. 738 (1967) and Rule 4-3(j) of the Rules of the Supreme Court. A no-merit brief must contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions, and requests made by either party with an explanation concerning why each adverse ruling is not a meritorious ground for reversal. *Adaway v. State*, 62 Ark. App. 272, 972 S.W.2d 257 (1998). The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be "wholly frivolous." *Anders*, 386 U.S. at 744. Pursuant to *Anders*, the appellate court is also required to make a determination "after a full examination of all the proceedings," whether the case is wholly frivolous. Appellant was notified of her counsel's brief and motion, and she filed no pro se points for reversal regarding the revocation.[1] The

[1]Appellant filed a handwritten letter with our court, but the text reveals that it pertains solely to the conviction for aggravated robbery, which was the subject of the merit-based brief filed by her attorney in that case. It essentially claims that the victim fabricated the story of her threatening him and attempting to rob him; she writes that she only approached Mr. Shy and asked for a quarter. The sufficiency of the evidence for this

State did not file a responsive brief due to the absence of any pro se points. We have determined that after proper review, counsel has complied with the mandates for a no-merit appeal and that an appeal of the revocation of her probation would be wholly frivolous. As a consequence, we affirm the revocation and relieve counsel from representation.

To explain more fully, appellant was placed on three years of probation which required that she comply with multiple conditions, including that she report regularly to her probation officer and pay a monthly supervision fee. The State petitioned to revoke her probation alleging that she had failed to abide by these conditions.[2] At the hearing, her probation officer, Robin Simmons, testified that appellant failed to report and was behind in her probation fees. Appellant, in her testimony, stated that she had made phone calls to her probation officer but admitted that she had not reported as she should. Appellant said she did not want to go see her probation officer and did not pay her fees because she was doing drugs at the time. Appellant agreed, "I didn't do what I was supposed to do." The trial court focused on the admitted failure to report as the basis to support revocation, and as a result, appellant was sentenced to three years in prison for the underlying crime.

To revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d) (Supp. 2003). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Richardson*

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conviction, argued on her behalf by her attorney, is fully discussed in the earlier portion of this opinion. Her letter does not pinpoint any allegation or complaint with regard to the revocation of her probation, and as such, the State's brief does not address the no-merit aspect of this appeal.

[2]While the record does not reflect the second petition to revoke her probation, as this was her second attempt to comply with probation, the discussion in open court reveals that such a petition was presented to the court and the parties, and that the allegations were failure to report and failure to pay supervision fees.

v. State, 85 Ark. App. 347, 157 S.W.3d 536 (2004); *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id*. When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* In the present case, appellant's own testimony supports the trial judge's decision to revoke her probation, and this is the basis that her attorney submits that any appeal would be wholly frivolous. We have to agree with counsel.

In sum, we affirm appellant's conviction, and we affirm her revocation. Appellant's counsel's motion to be relieved is granted as to the probation revocation case.

GLADWIN and BIRD, JJ., agree.